In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1445

JOHN J. McDONOUGH, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners are the School Committee for the City of Boston, Massachusetts, John J. McDonough, Paul R. Tierney, Kathleen Sullivan, David I. Finnegan, Elvira Palladino, as members of said School Committee, and Marion J. Fahey, as she is Superintendent of the Boston school system. Respondents are Tallulah Morgan, and fifty-six other black parents and their children who attend the Boston public schools. Petitioners pray that a writ of certiorari issue to review the judgment of the United

States Court of Appeals for the First Circuit entered in the above-entitled case on January 14, 1976.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not reported at this writing, but the slip opinion is reproduced in a separate Appendix, commencing at page 1.

The Memorandum of Decision and Remedial Orders of the District Court for the District of Massachusetts are reported at 401 F. Supp. 216 (D. Mass. 1975) and are reproduced in the separate Appendix, commencing at page 57.[1]

Judgments Below

The Further Remedial Orders requiring petitioners to implement the student desegregation plan of the United States District Court for the District of Massachusetts were entered on May 10, 1975, and are reproduced in the separate Appendix at page 198. The judgment of the Court of Appeals for the First Circuit was entered January 14, 1976, and is reproduced in the separate Appendix commencing at page 55.

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[1] Both the Opinion of the Court of Appeals for the First Circuit and the Memorandum of Decision and Remedial Orders of the District Court were entered *sub nom. Morgan, et al* v. *Kerrigan, et al.* As a result of a November, 1975 municipal election in Boston, petitioners David I. Finnegan and Elvira Palladino succeeded John J. Kerrigan and Paul Ellison as members of petitioner School Committee for the City of Boston on January 5, 1976. Pursuant to an Order of the District Court for the District of Massachusetts entered February 25, 1976, Mr. Finnegan and Ms. Palladino were substituted as parties defendant for Messrs. Kerrigan and Ellison, and the caption of the case in the District Court was changed to *Tallulah Morgan, et al.* v. *John J. McDonough, et al.* Petitioner Marion J. Fahey succeeded William J. Leary as Superintendent of the Boston Public Schools on September 1, 1975, and was substituted as a party defendant.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1) and Rule 22(3). The judgment of the Court of Appeals was entered on January 14, 1976, and this petition for certiorari was filed within ninety (90) days of that date.

Questions Presented

In a school desegregation case, may a Federal District Court, as part of its remedy, dictate the quality of education to be offered?

What are the limits of a Federal District Court's power in the remedial phase of a school desegregation case?

Constitutional Provisions Involved

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This petition seeks review of a judgment of the Court of Appeals for the First Circuit affirming a student dese-

gregation plan for the Boston Public School System formulated by the District Court for the District of Massachusetts and requiring petitioners to implement that plan.

Suit was brought by respondents, representing a class of all black public school students and their parents, against petitioners, the School Committee of the City of Boston, its individual members and the Superintendent of the Public Schools,[2] seeking relief against racial segregation in the operation of the Boston Public School System.

Federal jurisdiction was invoked under 28 U.S.C. § 1343. Violations of the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981, 1983 and 2000D were alleged.

On June 21, 1974, the District Court found that substantial segregation existed in the Boston Public Schools and that petitioners "took many actions in their official capacities with the purpose and intent to segregate the Boston public schools and that such actions caused current conditions of segregation in the Boston public schools." *Morgan* v. *Hennigan*, 379 F. Supp. 410, 424, 480 (D. Mass. 1974). It found the entire school system of Boston to be unconstitutionally segregated. *Id.* at 482. The Partial Judgment ruled that "the rights of the plaintiff class of black students and parents under the Fourteenth Amendment to the Constitution of the United States have been and are being violated by the defendants in their management and operation of the public schools of the City of Boston," permanently enjoined petitioners "from discriminating upon the basis of race in the operation of the public schools of the City of Boston and from creating, promoting, or maintaining racial segregation in any school or other facility in the Boston school system," and ordered

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[2] Also named as defendants, but not petitioners here, were the Board of Education of the Commonwealth of Massachusetts, its individual members, and the Commissioner of Education. The District Court found no liability against these "state defendants."

petitioners "to begin forthwith the formulation and implementation of plans which shall eliminate every form of racial segregation in the public schools of Boston, including all consequences and vestiges of segregation previously practiced by the defendants." *Id.* at 484. The Interlocutory Order preliminarily enjoined petitioners from:

> "(a) failing to comply in any respect with the Racial Imbalance Act plan ordered by the Supreme Judicial Court of Massachusetts to be implemented on or before the opening day of school in September, 1974;
> "(b) beginning the construction of any new school or expansion or the placement of any new portable;
> "(c) granting transfers of white teachers from schools with majority black enrollments or black teachers from schools with majority white enrollments;
> "(d) granting transfers [of students] under exceptions to the controlled transfer policy." *Id.*

Appeal to the Court of Appeals for the First Circuit pursuant to 28 U.S.C. §§ 1291 and 1292 was taken from the District Court's judgment of liability against petitioners, the resulting permanent injunction and the interlocutory order. On December 19, 1974, the Court of Appeals for the First Circuit affirmed the judgment of the District Court. *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974).

A petition for Writ of Certiorari to the Court of Appeals for the First Circuit was denied by this Court on May 12, 1975. *Kerrigan* v. *Morgan*, —— U.S. ——, 95 S. Ct. 1950 (1975).

Following its decision on June 21, 1974, the District Court commenced the exploration of appropriate remedies (A. 2), and on October 31, 1974 entered an Order dictating

generally the contents of a citywide student desegregation plan for the 1975-1976 school year to be filed by the petitioners on December 16, 1974.[3] This Order provided that:

> "In drafting the plan, the defendants shall utilize as a starting point and keep in mind the goal that the racial composition of the student body of every school should generally reflect the ratios of white and black students enrolled at that grade level of schools, elementary, intermediate and secondary, throughout the system." (A. 65).

Staff of the Boston School Department prepared such a plan, but on December 16, 1974, members of the petitioner School Committee voted not to submit it to the District Court. Notwithstanding that the "December 16 Plan" was filed with the District Court by petitioners' then counsel (A. 66), the District Court, because of petitioners' refusal to adopt the plan as their own, held three of the petitioners in continuing contempt of its October 31, 1974, Order. Following the denial of a stay pending appeal of the contempt order by the Court of Appeals for the First Circuit, *Morgan* v. *Kerrigan*, 509 F.2d 618 (1st Cir. 1975), the District Court found that the three members had purged themselves, and, on January 27, 1975, the School Committee did submit a student desegregation plan, (the "School Committee Plan") different from the plan proposed by the school department staff. (A. 4, n. 5).

An alternative student desegregation plan for the Boston

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[3] During the 1974-1975 school year, the Boston Public School System operated under a student desegregation plan of limited scope initially ordered into effect by the Supreme Judicial Court of Massachusetts and incorporated by reference into the Interlocutory Order of the District Court entered as part of its liability finding of June 21, 1974 (A. 62, 63).

Public School System was filed by the respondents on January 20, 1975, and the parties then filed comments on one another's submissions.[4] (A. 68).

On January 31, 1975, the District Court appointed two experts, Dr. Robert A. Dentler, Dean of the Boston University School of Education, and Dr. Marvin B. Scott, Associate Dean of the same school (the "experts"), to assist in the adoption of a student desegregation plan for implementation in September, 1975. (A. 68). The experts were directed to assist a panel of four masters appointed by the District Court on February 7, 1975, who were charged with considering the plans filed, holding evidentiary hearings, and making recommendations on a student desegregation plan to that Court. (A. 5, 68, 69).

After two weeks of such hearings and final arguments on their draft report, the Masters issued a final report on March 31, 1975, wherein they found the School Committee's plan inadequate because it relied primarily upon parental free choice; rejected the respondents' plan because it was educationally deficient, unwieldy and arbitrary; and rejected the December 16 plan as being vague and unduly burdensome to minorities. (A. 5, 6).

The Masters' final report proposed a new plan which incorporated certain elements of the plans submitted. (A. 69). Following hearings on objections to the Masters' plan, and after consideration of updated data furnished by the School Department in April, 1975 (A. 69), the District Court issued its own student desegregation plan on May

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[4] Between the period from the District Court's June 21, 1974 liability opinion and February, 1975, the Boston Teachers Union, the Boston Association of School Administrators and Headmasters, The Boston Home and School Association and El Comite De Padres Pro Defensa De La Education Bilingue were allowed to intervene. The Commissioners of the Public Facilities Commission, the Director of the Public Facilities Department and the Mayor of the City of Boston were joined as parties defendant in September, 1974. (A. 3, 68).

10, 1975, but deferred entry of its underlying decision until June 5, 1975, at which time the May 10 plan was included as Part V of the District Court's Memorandum of Decision and Remedial Orders. (A. 118).

On June 17, 1975, the Court of Appeals for the First Circuit denied petitioners' motion for a stay of the District Court's plan pending appeal. *Morgan* v. *Kerrigan*, 523 F.2d 917 (1st Cir. 1975).

Reasons for Granting the Writ

The District Court's finding, at the liability stage, that the respondents have been denied equality of educational opportunity has become the vehicle by which the District Court has sought to justify remedial orders which far exceed any proven constitutional violation. The District Court has ordered changes in the content of education to be offered in the schools; it has formulated educational policy; and it has entered orders requiring the expenditures of monies, not to bring about the dismantling of a dual school system, but to improve the general quality of education which is to be offered in the school system.

The District Court has proceeded to place itself in the shoes of the publicly elected petitioners, mandating its own notions of good educational policy unrelated to the demands of the Constitution. It has initiated precedent for the eradication of local control over educational policy and the wholesale operation of the public schools by federal district courts in school desegregation cases. The result has been an unrestrained, *de facto* receivership of the entire Boston School system.

To appreciate the magnitude of the departure from precedent sanctioned by the Court of Appeals in its affirmance of the District Court's plan, a brief review of the standards governing district courts in desegregation

cases of this sort is necessary. The leading case governing the available remedial options is *Swann* v. *Board of Education,* 402 U.S. 1 (1971), wherein this Court stated that:

> "[A]bsent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis . . . But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations . . .
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> "No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system." *Id.* at 28.

In *Milliken* v. *Bradley,* —— U.S. ——, 94 S. Ct. 3112 (1974), this Court, elaborating on *Swann, supra,* stated:

> "[T]he task is to correct, by a balancing of the individual and collective interests, 'the condition that offends the Constitution.' A federal remedial power may be exercised 'only on the basis of a constitutional violation' and '[a]s with any equity case, the nature of the violation determines the scope of the remedy.' 402 U.S. at 15, 16." *Id.* at 3124.

This Court has made it clear that the broad, but not unlimited, remedial powers of federal courts in school desegregation cases must be directed toward remedying the constitutional violation; that is, the existence of the dual school system. When a district court aims at im-

proving the overall quality of education and educational facilities, it has exceeded the limits of its remedial powers by ceasing to address itself to the condition that offends the Constitution.

Specifically, the District Court below mandated that the 1975-1976 entering classes at the examination schools [5] be at least thirty-five percent black and Hispanic (A. 162); that the petitioners appoint additional superintendents, principals and headmasters (A. 51, 52, 119); that certain courses that had not previously been offered be taught (A. 169-174); that two court-appointed experts supervise the assignment of students (A. 179, 181), decide program allocations (A. 53-54), and oversee the nature of instruction (A. 83); that the petitioners enter into contracts with institutions of higher education to share in the development and direction of curriculum and instruction (A. 107-110, 163-168); and that community groups be established to participate in the educational process. (A. 110, 111, 119, 187-192).

In sum, the violation of the respondents' rights to equal educational opportunity has been remedied, not merely by disestablishing the dual school system, but by changing the educational policy of the petitioners. The case has reached the stage where the District Court has decided that the respondents are entitled not only to an equal education, but to a better education, as evidenced by the District Court's statement that it was ordering the pairing of certain schools with the institutions of higher education to "improv[e] the quality of education throughout the school system." (A. 107). Since these pairings are to be "long-term commitment[s]" to "the quality of education" (A. 108), under the District Court's order, there can never

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[5] The examination schools are Boston Latin School, Boston Latin Academy and Boston Technical High School. These schools have a long history of providing an excellent education to any student who has sufficient scholastic ability to keep up with their rigorous standards. (A. 100).

be a point where the petitioners "should have achieved full compliance." *Swann, supra* at 31.

The Court of Appeals for the Tenth Circuit, unlike the Court of Appeals for the First Circuit, has recognized that district courts should not venture into the area of educational philosophy.

In *Keyes* v. *School District No. 1,* 521 F.2d 465 (10th Cir. 1975), the Tenth Circuit rejected the argument that school authorities could be forced to establish a receptive environment for minority students. It found that the "Cardenas Plan," which required "an overhaul of the system's entire approach to education of minorities," was beyond the limits of the District Court's remedial powers. *Id.* at 480, 481. The *Keyes* court went on to state that:

> "Courts have the power to effectuate their remedial orders by removing all obstacles to meaningful desegregation. *Brown II*, . . ., 349 U.S. at 299-300. The equitable power to order relief adjunct to desegregation is limited, however, by considerations that loom significantly in the present case. One of these, as we have noted, is the extent of the proven constitutional violation and its relationship to the ordered relief." *Id.* at 481.

In reaching its conclusion that the District Court had gone too far, the Tenth Circuit considered the following factors:

> "Direct local control over decisions vitally affecting the education of children 'has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.' *Milliken* v. *Bradley,* 418 U.S. 717, 741, 742; *Wright* v. *Council of City of Em-*

> *poria,* 407 U.S. at 451, 469. Local control permits citizen participation in the formulation of school policy and encourages innovation to meet particular local needs. Educational policy, moreover, is an area in which the courts' 'lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at state and local levels.' *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 42." *Id.* at 482.

Reversing a District Court order that combined two high schools, the *Keyes* court stated that the District Court had erred in acting "solely according to its own notions of good educational policy unrelated to the demands of the Constitution." *Id.* at 483. What has been stated by the *Keyes* court has been the longstanding position of the petitioners: Where a Constitutional violation is found, then remedies, even "bizarre" remedies, may be ordered, but they must be limited functionally to desegregation.

The Court of Appeals for the First Circuit considered the petitioners' objections to the District Court's intrusion upon their function (A. 46-54), but found that the overriding justification for these encroachments, "which might otherwise be open to question" (A. 47), was that "the district court in this case has had to deal with an intransigent and obstructionist School Committee majority. These elected officials engaged in a pattern of resistance, defiance and delay." (A. 46).

In so justifying the District Court's action, the First Circuit has enunciated a new standard. Where local school officials are intransigent and obstructionist, no longer need a district court confine its desegregative remedy to the specific constitutional violation. Rather, it is to look at the offending party and determine its attitude. Thereafter, all restraints are removed. Even though the offending party

may not in fact have defaulted, it may be stripped of its most basic powers.

The pernicious result of such a standard is made plain in the instant case. The issue of the petitioners' default in the area of the quality of education offered on a system-wide basis in the Boston schools was never litigated. There was no evidence that the quality of education offered was in any way diminished by petitioners. Petitioners' obstruction itself was never litigated nor even in issue prior to the findings of the District Court. Nevertheless, petitioners, because of an imagined attitude, are forced to give up their powers, as elected public officials, of deciding educational policy.

The petitioners were fearful that once the door to deciding what is and what is not quality education, or what courses would or would not be taught, was opened by the District Court, it would never be closed. Subsequent events have borne out these fears. The District Court has placed one high school into receivership and ordered a complete revamping of the physical facilities at that school. Among other things, the petitioners were ordered to purchase, e.g., "glass backboards" for the basketball court, "10 to 12 new MacGregor X10L basketballs," "1 case of tape (1½" width) for taping ankles," "1 chalk pan," etc. The issues raised by these orders have been appealed and are pending before the Court of Appeals for the First Circuit. *Morgan* v. *McDonough*, No. 75-1482.

If a district court can proceed this far, then the past admonitions of this Court can be thrown to the wind.

In *Milliken* v. *Bradley*, — U.S. —, 94 S.Ct. 3112 (1974), it was made clear that:

> "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essen-

> tial both to the maintenance of community concern and support for public schools and to quality of the educational process. See Wright v. Council of the City of Emporia, 407 U.S. 451, 469. Thus, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 50, we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation and a healthy competition for educational excellence.' " *Id.* at 3125, 3126.

In his dissenting opinion in *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972), Mr. Chief Justice Burger stated:

> "This limitation on the discretion of the district courts involves more than polite deference to the role of local governments. Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extracurricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed preferable in the abstract by a judge might well overlook and thus undermine these primary concerns." *Id.* at 477-478.

This Court, in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), pointed out that:

> "Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Id.* at 43.

Again, this Court, in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), stated:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly

> and sharply implicate basic constitutional values. On the other hand, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960)." *Id.* at 104.

Are these decisions still the law of the land or will the federal courts be permitted now to turn to the unprecedented approaches of the District Court in this case, approaches which mandate the long-term goal of improving the quality of education in the Boston public schools and which are affirmed by the Court of Appeals with such statements as "quality [of education] is a key to this [magnet] aspect of a plan of desegregation." (A. 49).

The overbreadth of the District Court's remedy is clearly evidenced by its approach to the magnet schools. The Court of Appeals correctly notes that it was the petitioners who proposed magnet schools as an element of their desegregation plan (A. 47); but in so proposing the petitioners did not thereby invite the District Court's determination that, e.g., at East Boston High School the petitioners must introduce new fields of education which "will stress instruction in environmental protection and aviation-linked technology." (A. 171).

In dismissing petitioners' objections to the District Court's mandating the type of new programs to be put into the magnet schools, the Court of Appeals stated that "[i]mplicit in the power to use magnet schools, at least upon the default of the School Committee, is the power to specify programs essential to make them magnetic." (A. 48). There had been no default by the petitioners in this area, yet the Court of Appeals sanctioned the District Court proceeding as if there had.

Moreover, it must be noted again here, and noted with emphasis, that the District Court, in addressing the area of quality education, did not limit itself to the magnet

schools. As the District Court, itself, said, its plan was designed

> "[t]o assist the Boston school system in developing the new magnet programs and also in improving the quality of education *throughout the school system* . . ." (emphasis added) (A. 107).

Perhaps the best example of the District Court's system-wide interference with educational policy may be found in its order that the petitioners use their best efforts to enter into contracts with colleges and universities. (A. 164). The District Court notes that these institutions "have committed themselves to support, assist, and participate in the development of educational excellence within and among the public schools of Boston." (A. 163). The District Court further notes that these commitments "shall enable participating institutions of higher learning to share in the direction and development of curriculum and instruction under court-sanctioned contracts with the School Department." (A. 164).

Clearly the District Court is no longer concerned with the eradication of the dual system, but with better education, a direction sanctioned by the Court of Appeals in the area of magnet schools on the grounds that:

> "Reliance on the Committee to create imaginative programs of utility and attractiveness would not only have been ill advised, but the supervision of compliance in this area, as opposed to student assignment for example, would have been extraordinarily complex and might well have drawn the court into purely educational decisions." (A. 49).

This is extraordinary in view of the fact that there was no showing of default by the petitioners in this area; that the petitioners were the moving force behind the magnet

school idea; and that the petitioners have successfully operated magnet schools for a number of years. (A. 47). Nonetheless, petitioner's control over the Boston schools is usurped. The Court of Appeals concedes that the action is innovative and without precedent (A. 50), an observation with which petitioners entirely concur, since at no time has any court sought to go further than to remedy the offending condition, nor has any court imposed a remedy, as here, in the area of quality of education, where there has been no adjudication of default. More remarkable is the Court of Appeals' noting that the District Court did not want to be drawn into purely educational decisions (A. 49, 50), yet that is precisely what has happened because of the overbreadth of the District Court's plan.

Other provisions of the District Court's plan are equally contrary to prior decisions of this Court. The establishing of citizen groups to support efforts to improve quality education in the schools (A. 110, 111, 189), to resolve problems which they identify (A. 188, 190), to advise the petitioners (A. 190), and to discuss the educational needs of each district (A. 119, 192), are far beyond the powers of the District Court. The Court of Appeals, on the one hand, notes that "better quality education as a general goal is beyond the proper concern of a desegregation court ..." (A. 51), yet, on the other hand, upholds this desegregation plan which provides for the intrusion of selected citizen groups to improve the quality of education and for pairings with institutions of higher learning for the same purpose. The petitioners contend that it is their duty to improve the quality of education where it is deficient; not the District Court's duty, nor the duty of court-established citizen committees or court-appointed experts or institutions of higher learning.

The District Court ordered that the petitioners appoint three additional District Superintendents and that each community school facility be administered by an adminis-

trator at the rank of principal or headmaster. (A. 119). The Court of Appeals dismisses the petitioners' argument that this exceeds the District Court's remedial powers by referring to information it received outside the record that the District Court's intent was that there be a "person in charge" of each school. (A. 52). The petitioners may be required, however, due to union considerations, to compensate these people at the rate of headmaster or principal. The order to have additional principals and headmasters is a purely educational decision which involves additional costs for the citizens and which in no way relates to the goals of the District Court.

The order that thirty-five percent of the 1975-1976 entering class to the examination schools be black or Hispanic (A. 162) is likewise an educational decision, since the type and quality of education to be offered may have to be changed to insure that those admitted can remain, given the veiled threat that unless the proportion of minorities is increased, the structure of the elite schools may be changed. (A. 162). There are some opinions in the educational field that these schools perform a disservice and, if the District Court shares that opinion, and if this is a better education case, then the destruction of such schools may well be the result.

That the goal of the District Court is to improve the education in the City of Boston is demonstrated by an article written by one of the District Court's experts, Robert A. Dentler,[6] "Improving Public Education: The

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[6] Mr. Dentler is the Dean of the Boston University School of Education. The President of Boston University, John R. Silber, has recently written an article seeking public funds for his university. See, "Paying the Bill for College — The Private Sector and the Public Interest," *Atlantic Monthly*, Vol. 235, No. 5, May, 1975. It is clear that the District Court's orders requiring contracts with the colleges and universities, including Boston University (A. 166), will go a long way toward assisting that school in its search for funds. If the decision in this case stands, the public coffers will be depleted to assist the 'private' sector.

Boston School Desegregation Case," *The Advocate*, Suffolk University Law School Journal, Vol. 7, No. 1, Fall 1975. Mr. Dentler boasted that "[n]o federal court order issued in the twenty years between *Brown* and *Morgan* . . . had ever been so consciously and explicitly aimed at effective improvements in public education." *Id.* at 4. He further predicts that "[a]fter the remedial order . . . every federal case concerning school desegregation will be more than what some lawyers call a 'race case.' *Every case will be a case involving detailed educational planning . . .*" (emphasis added) *Id.* at 8.

Mr. Dentler concludes by stating that "[c]ourt jurisdiction will continue indefinitely, until the judge decides that equal protection—which in education must mean improved conditions for learning—has been accomplished and is self-maintaining." *Id.* at 8. It must be noted that Mr. Dentler is in frequent contact with the District Court and could be considered its alter ego. He is the same expert whom the District Court appointed to supervise the assignments (A. 179, 181), to give attention to the nature of the instruction (A. 83), and to resolve "issues with respect to facilities utilization, program allocation and enrollment units." (A. 53).

If the decisions below stand, then Dentler is correct, and federal courts are in the education business. Clearly, this notion runs contrary to every decision of this Court and, if not overruled, will sound the death knell of local control over public schools.

The Court of Appeals for the First Circuit has sanctioned this unorthodox "remedy" by affirming the student desegregation plan. There is no precedent for these departures anywhere among the myriad of prior school desegregation

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Moreover, in a letter to the court-appointed Masters, President Silber, in March of 1975, stated that the Boston schools were inadequate and mediocre, thus helping to lay the groundwork for this better education plan without the necessity of litigating the issue.

cases. Such a sudden and drastic departure from precedent requires this Court to intervene, lest the longstanding tradition of local control over the educational policies of public schools is wrested from the hands of the citizens and their duly elected representatives, and placed into the hands of the federal judiciary.

As previously argued, the Court of Appeals for the Tenth Circuit, unlike the Court of Appeals for the First Circuit. has recognized that District Courts should not venture into the area of educational philosophy. The conflict between the Circuits is obvious and requires immediate resolution by this Court.

Finally, the importance of this case can be seen from what has been previously stated. The City of Boston is presently suffering the financial burdens of attempting to comply with a better education decision which knows no end. Other cities may be likewise ensnarled in this type of interference unless the precedent of *de facto* receivership created by the lower courts is quickly overturned. This case presents substantial questions which should be answered now.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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